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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

EDWARD CHARLES PICKENS — PETITIONER

VS. NO. 80-6299

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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ATTORNEYS FOR RESPONDENT

NO. 80-6299

IN THE
SUPREME COURT OF THE UNITED STATES
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EDWARD CHARLES PICKENS — PETITIONER

vs.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTIONS PRESENTED FOR REVIEW

Whether petitioner was denied due process of law by the affirmance of his conviction and sentence of death on the jury's findings with regard to an element of the crime charged.

Whether petitioner was denied equal protection and his right under the Eighth and Fourteenth Amendments to meaningful and responsible review of his conviction and sentence.

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The opinion of the Arkansas Supreme Court affirming petitioner's conviction is found at 261 Ark. 756, 551 S.W.2d 212 (1977). The opinion of the Supreme Court of Arkansas denying petitioner's petition for post conviction relief was unpublished and thus is an unreported opinion. A copy of the opinion appears in Appendix B. A copy of the opinion affirming petitioner's conviction appears in Appendix A.

JURISDICTION

The petitioner has adequately set forth the grounds for jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The petitioner has adequately set forth the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

The petitioner has adequately set forth the facts of the case.

REASONS FOR DENYING THE WRIT.

1. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY THE AFFIRMANCE OF HIS CONVICTION AND SENTENCE OF DEATH AS THE JURY DID NOT MAKE INCONSISTENT FINDINGS WITH REGARD TO AN ESSENTIAL ELEMENT OF THE CRIME CHARGED.

Petitioner contends that he was denied due process of law by the affirmance of his conviction and sentence of death alleging that the jury made totally inconsistent findings with regard to an essential element of the crime charged. Specifically, petitioner submits that the jury's special finding that the murder was not committed for pecuniary gain is inconsistent with its general verdict of guilt of the crime charged and negates an essential element of the crime which the jury had to find beyond a reasonable doubt. See Petition at 11.

Respondent would submit that the jury's finding that the murder was not committed for pecuniary gain is not inconsistent with its general verdict of guilt of the crime charged.

Petitioner Edward Charles Pickens was charged by information with capital felony murder in violation of Ark. Stat. Ann. §41-7402(A) (Supp. 1973), the information alleging that petitioner did murder one Wesley Noble during the perpetration of a robbery. (T. 27, 28) After deliberation, the jury found petitioner guilty of capital murder as charged in the information. (T. 42)

The jury was then instructed with regard to sentencing and that its findings on aggravating circumstances must be unanimous and beyond a reasonable doubt. After further deliberation, the jury returned with its designated findings of fact. The jury found three of the aggravating circumstances to exist beyond a reasonable doubt: (1) the defendant beyond a reasonable doubt had previously been convicted of a felony involving the use or threat of violence; (2) the defendant beyond a reasonable doubt created a great risk of death to one or more persons in addition to the victim; and (3) the capital felony murder was beyond a reasonable doubt committed for the purpose of avoiding a lawful arrest. The jury concluded that the capital felony murder was not committed for pecuniary gain. (T. 43, 44)

Petitioner now contends that the jury's finding that the capital felony murder was not committed for pecuniary gain is inconsistent with his conviction for capital felony murder during the perpetration of a robbery.

Respondent would submit that the facts clearly show that the murder of Wesley Noble was to prevent him from identifying petitioner and not for pecuniary gain. As the opinion of the Arkansas Supreme Court reveals (Appendix A), petitioner's own testimony substantiates the above position, to-wit:

> Cloud's Grocery store at Casscoe, Arkansas was held up by three Negro men wielding a sawed-off shot gun and a .22 pistol. After raping the female clerk, the holdup men caused the woman, the store's owner and seven of the customers, all of whom had been robbed, to lie on the floor with their faces down. While in that position, seven people were shot by a .22 pistol. The .22 pistol was reloaded and fired a second time into several of the victims. Harold Goacher described the holdup men as being two dark Negro men and a light colored one. It was Goacher's testimony that the two dark Negro men took turns in firing the .22 pistol. Appellant Edward Charles Pickens, a/k/a Larry Coakley, an ex-convict from the State of Michigan, admits that he was present when the shooting occurred but insists that the light colored Negro man was the one who shot the victims in order to prevent the victims from identifying the holdup men. Some, but not all of the victims survived. The jury found appellant guilty of Capital Felony Murder of Wes Nobles, one of the Negro customers at the grocery store. (Emphasis added)

Pickens v. State, 261 Ark. at 757.

Petitioner relies on Bly v. State, 263 Ark. 138, 562 S.W.2d 605 (1978) for the proposition that "absent proof that a robbery was attempted or committed, petitioner's conviction of capital murder cannot stand." See Petition at 10. Respondent would submit that Bly is distinguishable from the facts herein.

In Bly, the facts revealed that the victim, Burns, was killed following a dispute over whether he should have contributed $2.00 of $4.00 for gasoline that Bly had paid for while they were driving around with another friend named Tumbleson. In reviewing the evidence, the Arkansas Supreme Court observed that:

> The evidence in this case certainly cannot be characterized as substantial evidence that Bly committed a robbery. Even if we concede there

is room for argument on this issue, when we consider the jury's findings as to aggravation and mitigation, we are convinced that the conviction cannot stand. The jury found:

> (1) That the murder was committed by someone other than Bly [which could only be Tumbleson.]
>
> (2) That the murder was not committed for pecuniary gain.
>
> (3) That the murder was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

All of these findings are inconsistent with the finding that Bly was guilty of capital murder as charged. If Bly did not kill Burns, if it was not done for pecuniary gain, and, if it was not done to prevent a lawful arrest -- that is to prevent discovery of the robbery -- then it would not be a murder committed while engaged in the prepetration of a robbery as charged.

Considered as a whole, the question of whether there even was a robbery, the obvious remoteness of the "robbery" from the killing, and the inconsistent findings by the jury in determining the sentence, require us to reverse the case.

Bly v. State, 263 Ark. at 141.

In the instant case, there is no dispute as to whether there was a robbery. On the contrary, petitioner's own testimony at trial established that he took part in the robbery. The only issue is whether the fact that the killings took place after the consummation of the robbery, justifying the jury's finding that the murders were for the purpose of avoiding identification and arrest rather than pecuniary gain, vitiated the underlying felony of robbery.

In this regard, respondent would submit that any pecuniary gain had already been reaped, thus satisfying the robbery requirement, and that the purposes of the killings were to prevent identification and arrest as the jury properly found. State v. Holton, 197 Neb. 544, 250 N.W.2d 876 (1977), cert. denied, 434 U.S. 912 (1977).

Hence, petitioner's allegation in this regard is without merit.

2. PETITIONER WAS NOT DENIED EQUAL PROTECTION AND HIS RIGHT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO MEANINGFUL AND RESPONSIBLE REVIEW OF HIS CONVICTION AND SENTENCE.

Petitioner contends that the Arkansas Supreme Court's failure to review constitutional error in the record denied him equal protection and his right under the Eighth and Fourteenth Amendments to meaningful and responsible review of his conviction and sentence to ensure that the sentence is not arbitrarily or capriciously imposed. See Petition at 14.

Specifically, petitioner first submits that he was denied meaningful appellate review of his contention that the inconsistent verdicts discussed above rendered his conviction void. The Arkansas Supreme Court found this contention not properly raised for the first time in a petition for post conviction relief as it was not 1) preserved by an objection at trial, 2) raised on direct appeal or 3) raised in petitioner's motion for a new trial.

Furthermore, as discussed above, petitioner's contention is without merit and would not render his conviction void. It was, therefore, not properly raised in a petition for post conviction relief under Ark. R. Crim. Proc., 37.1(a) Ark. Stat. Ann. Vol. 4A at 523 (Repl. 1977).

Secondly, petitioner contends that he was denied a meaningful opportunity to be heard on his contention that prospective jurors were improperly excluded under the Witherspoon rule. The absence of a meaningful opportunity, as explained by petitioner, was the result of the Arkansas Supreme Court's failure to order a transcript of the voir dire proceedings. This failure, however, was on petitioner's part as evidenced by the following excerpt from the Per Curiam order (Appendix B) denying his post conviction petition, to-wit:

> "Finally, on June 23, 1980, we denied petitioner's petition for writ of certiorari without prejudice to his right to apply to the trial court for a supplemental transcript. He now asks us to clearly specify that the trial court has jurisdiction to entertain a motion for supplementation of the record. By our June 23rd order, we vested the trial court with the jurisdiction to entertain such a motion. Petitioner apparently chose to proceed with this petition without applying to the trial court or even to us for clarification. Under Rule 37.2(b), all grounds for relief under this Rule must be raised in the original or amended petition and any grounds not so raised may not be the basis for a subsequent petition."

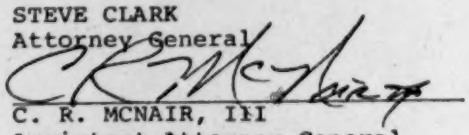
Lastly, petitioner alleges that he was also denied a meaningful opportunity for review of his assertion that he was denied the effective assistance of counsel. See Petition at 22. This allegation, however, is also unsupported by the Per Curiam order (Appendix B) denying petitioner's request for post conviction review. That order clearly shows that the Arkansas Supreme Court considered and disposed of all nine allegations of counsel's ineffectiveness before denying the petition for post conviction relief on that issue. Hence, respondent submits that petitioner was not denied a meaningful opportunity for review of that assertion.

CONCLUSION

For the reasons set forth, a writ of certiorari to review the judgment and opinion of the Supreme Court of Arkansas should be denied,

Respectfully submitted,

STEVE CLARK
Attorney General

By: 

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APPENDIX A

Edward Charles PICKENS a/k/a Larry COAKLEY *v.* STATE of Arkansas

CR 76-186 551 S.W. 2d 212

Opinion delivered June 6, 1977
(In Banc)

1. PROSECUTING ATTORNEYS — SPECIAL COUNSEL, RIGHT TO REQUEST — DEPUTY ATTORNEYS GENERAL AS SPECIAL PROSECUTORS. — It is permissible for the prosecuting attorney to request the assistance of special counsel in the prosecution of a criminal case, and it was not error for the trial court to allow deputy attorneys general to act as special prosecutors.
2. VENUE — REQUEST FOR CHANGE OF VENUE — FAILURE TO OBJECT TO VENUE FIXED BY COURT. — Where appellant did not object after the court granted his request for change of venue but specified a different district, he cannot contend on appeal that the trial was held in an improper place.
3. TRIAL — MOTION FOR NEW TRIAL — TRANSCRIPT OF RECORD, SUFFICIENCY OF. — Appellant's motion for new trial on the grounds that a complete transcript could not be made since the court reporter's tape recordings of the trial were destroyed by fire was properly overruled where the court found that the transcript prepared from the reporter's shorthand notes was true and accurate, and defendant was given an opportunity to offer any corrections or additions but did not do so.
4. CRIMINAL LAW — RIGHT TO COUNSEL — WAIVER. — Where the totality of the evidence shows that appellant was fully informed of his rights but voluntarily waived his right to counsel, there is no merit to his contention that he was denied that right.
5. APPEAL & ERROR — FAILURE TO OBJECT AT TRIAL — EFFECT. — The Supreme Court does not consider issues raised for the first time on appeal.
6. CRIMINAL LAW — SEARCH OF ABANDONED VEHICLE — EVIDENCE SEIZED ADMISSIBLE. — A search warrant is not required before the police can search an abandoned vehicle from which a defendant flees to prevent apprehension by the police.
7. CRIMINAL LAW — SEARCH, CUSTODIAL — EVIDENCE SEIZED ADMISSIBLE. — A ring taken by appellant from a rape victim and removed from appellant's finger during a custodial search at the jail where he was incarcerated is admissible in evidence.
8. CRIMINAL LAW — MURDER WEAPON — ADMISSIBILITY. — Where a gun used in a robbery-murder was found on the street near where the appellant, who admittedly had handled the gun, was apprehended, it was not obtained as a result of an illegal search

and was admissible in evidence.

9. CRIMINAL LAW — PUNISHMENT, DEATH BY ELECTROCUTION AS — CONSTITUTIONALITY. — Carrying out the sentence of death by electrocution for the crime of capital felony murder under Arkansas law does not violate the Eighth or Fourteenth Amendment to the Constitution of the United States.

10. CRIMINAL LAW — CAPITAL FELONY MURDER — AGGRAVATING & MITIGATING CIRCUMSTANCES, EFFECT OF. — In a conviction for capital felony murder where the jury found four aggravating circumstances and no mitigating circumstances, there is no basis to hold that the sentence of death was wantonly or freakishly imposed.

Appeal from Prairie Circuit Court, *William M. Lee*, Judge; affirmed.

Willis Plant, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Jackson Jones* and *Robert A. Newcomb*, Asst. Attys. Gen., for appellee.

CONLEY BYRD, Justice. Cloud's Grocery store at Casscoe, Arkansas was held up by three Negro men wielding a sawed-off shot gun and a .22 pistol. After raping the female clerk, the holdup men caused the woman, the store's owner and seven of the customers, all of whom had been robbed, to lie on the floor with their faces down. While in that position, seven people were shot by a .22 pistol. The .22 pistol was reloaded and fired a second time into several of the victims. Harold Goacher described the holdup men as being two dark Negro men and a light colored one. It was Goacher's testimony that the two dark Negro men took turns in firing the .22 pistol. Appellant Edward Charles Pickens, a/k/a Larry Coakley, an ex-convict from the State of Michigan, admits that he was present when the shooting occurred but insists that the light colored Negro man was the one who shot the victims in order to prevent the victims from identifying the holdup men. Some, but not all of the victims survived. The jury found appellant guilty of Capital Felony Murder of Wes Nobles, one of the Negro customers at the grocery store. After hearing additional testimony in a bifurcated trial the jury returned a verdict fixing appellant's punishment at death by electrocution. For reversal, appellant raises the issues hereinafter discussed.

POINT I. We find no merit to appellant's contention that it was error for the trial court to allow two Deputy Attorneys General to act as special prosecutors. This Court has long recognized that it is permissible for the prosecuting attorney to request the assistance of special counsel in the prosecution of a criminal case; *Coon* v. *State*, 109 Ark. 346, 160 S.W. 226 (1913). No abuse of the trial court's discretion is shown in the case before us.

POINT II. The record shows that appellant moved to adopt the pretrial pleadings and motions filed on behalf of Sherwood Vincent Gooch. The trial court permitted appellant to adopt Gooch's motion but in doing so specifically provided that the change of venue in appellant's case would be to the Southern District of Prairie County rather than to the Northern District in Gooch's case. Appellant did not thereafter object to the venue and cannot now contend that the trial was held in an improper place.

POINT III. After the trial but before the transcript of the testimony was prepared, the home of the official court reporter was destroyed by fire. Appellant at that time moved for a new trial on the basis that the tape recordings made by the court reporter during the course of the proceedings were destroyed and consequently, the court reporter could not necessarily make a full, complete, exact and accurate transcription of the record at trial. Appellant's motion recognized, however, that the court reporter still had her shorthand notes. The trial court, in overruling appellant's motion, made the following finding, to-wit:

> ". . . That from the reporter's shorthand record of the trial proceeding the court reporter has prepared a true and accurate transcription of the trial proceeding herein and certified same in the usual manner and a copy thereof has been filed with the Circuit Court Clerk at DeValls Bluff, Arkansas and also a copy of same has been delivered to the attorney for the defendant on September 7, 1976. That defendant's attorney was advised that if he could show the Court within twelve days wherein any material mistake or objection was made and/or omitted, the transcript would be corrected ac-

cordingly. There has been no such mistake or omission presented to the Court."

On the basis of the trial court's finding, we must conclude that the motion for new trial was properly overruled. We note that in some instances there are some omissions of isolated words in the transcript, however, appellant does not contend that the transcript before the Court omits any matters of consequence.

POINT IV. Appellant contends that he was denied his Sixth Amendment right to counsel at two critical stages of the prosecution which also had the effect of vitiating his Fifth Amendment rights. These contentions have no merit. The totality of the evidence shows that appellant voluntarily waived his right to counsel and signed a confession after he was fully informed of his rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The record also shows that appellant voluntarily waived his right to counsel in the line-up identification conducted after his arrest by the Memphis, Tennessee Police.

For the first time on appeal appellant contends that the signing of the rights waiver by appellant did not appear in the response to the Bill of Particulars filed by the State. In making the suggestion, appellant does not intimate that he was in any manner prejudiced by the State's alleged failure. Furthermore, the Bill of Particulars Item 1(29) lists "Line-up rights form" as having been furnished to the attorney for appellant. See also Item 4(1) of the Bill of Particulars which refers to a waiver of rights form. Also we do not consider issues raised for the first time on appeal.

POINT V. Appellant contends that the evidence found in the stolen automobile that he and his confederates abandoned in Memphis shortly before their apprehension should have been suppressed because the police did not secure a search warrant. We do not understand the law to require a search warrant before the police can search an abandoned vehicle from which a defendant flees to prevent apprehension by the police. See J. Varon, *Searches, Seizures and Immunities*, Chapter III, § 3 at 183 (2d Ed. 1974).

Neither do we find any merit to appellant's contention that the diamond wedding band taken from the rape victim during the holdup should be suppressed. See *United States* v. *Edwards*, 415 U.S. 800, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974). The record shows that the ring was removed from appellant's little finger during a custodial search at the jail in Memphis after his arrest.

The .22 pistol was found by an alert citizen on the streets of Memphis near the point of appellant's apprehension by the officers. Appellant is not in a position to claim an illegal search.

Appellant under this point also suggests that there was no direct link established between him and the gun found by the Memphis citizen. The record shows that Captain McDonald, a ballistics expert, identified the bullet found in Wes Nobles, the decedent, as having been fired from the recovered .22 pistol. Furthermore, appellant admits that he handled the .22 pistol that was fired into the robbery victims. Consequently, this contention has no merit.

POINT VI. Finally appellant contends that the imposition and carrying out of the sentence of death by electrocution for the crime of Capital Felony Murder under the law of Arkansas violates the Eighth or Fourteenth Amendment to the Constitution of the United States. We find no merit to the contentions made. See *Collins* v. *State*, 261 Ark. 195, 548 S.W. 2d 106 (1977), *Neal* v. *State*, 261 Ark. 336, 548 S.W. 2d 135 (1977), *Giles* v. *State*, 261 Ark. 413, 549 S.W. 2d 479 (1977), *Gregg* v. *Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), *Proffitt* v. *Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976) and *Jurek* v. *Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976).

In making its findings on aggravating and mitigating circumstances the jury made the following specific findings:

> "The Defendant was, beyond a reasonable doubt, previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The Defendant did, beyond a reasonable doubt, in the commission of the capital felony, knowingly create a great risk of death to one (1) or more persons in addition to the victim.

The capital felony was, beyond a reasonable doubt, committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The capital felony was not committed by another person and the Defendant was not an accomplice or his participation relatively minor."

There is substantial evidence to support the jury's findings on each of the above facts and in the absence of any mitigating circumstances, we can find no basis in the record to hold that the sentence of death was wantonly or freakishly imposed against appellant. Like *Neal* v. *State, supra*, this is just another example of a robber who makes the cold-blooded calculation that by annihilating his victim he thereby eradicates an eyewitness to his crime. Society has every right to display an indignant and moral outrage at such offensive conduct and no court should hold that a jury cannot respond to such a grievous affront to humanity by invoking the death penalty in accordance with the laws of the State.

A search of the record shows no other objection made by appellant in the trial court that is worthy of comment.

Affirmed.

GEORGE ROSE SMITH, HOLT and HICKMAN, JJ., concur in the result but adhere to the views expressed in *Collins* v. *State*, 261 Ark. 195 (1977).

APPENDIX B

NOT DESIGNATED FOR PUBLICATION.
SEE REVISED SUPREME COURT RULE 21.

SUPREME COURT OF ARKANSAS

No. CR 76-186

NOV 3 - 1980

EDWARD CHARLES PICKENS Petitioner	PETITION TO PROCEED UNDER CRIMINAL PROCEDURE RULE 37
v.	
STATE OF ARKANSAS Respondent	PETITION DENIED

PER CURIAM

Petitioner Edward Charles Pickens was found guilty of capital felony murder and was sentenced to death by a jury on February 5, 1976. On June 6, 1977, we affirmed the judgment on appeal. Pickens v. State, 261 Ark. 756, 551 S.W. 2d 212 (1977), cert. denied, 435 U.S. 909 (1978).

On September 2, 1980, petitioner filed a petition for permission to proceed under Arkansas Criminal Procedure Rule 37 for postconviction relief. Since the petition was not filed within 3 years of the date of commitment as required by Rule 37.2(c), the petition is untimely unless the grounds for relief would render the judgment of conviction absolutely void.

Rule 37 affords relief when a sentence was imposed in violation of the Constitution or laws of the United States or this State or "is otherwise subject to collateral attack." The rule does not serve as a substitute for direct appeal or as a method for review of mere error in the conduct of the trial. Neal v. State, 270 Ark____ (September 29, 1980); Hulsey v. State, 268 Ark_____, 595 S.W. 2d 934 rehearing denied 599 S.W. 2d 729 (1980); Clark v. State, 255 Ark 13, 498 S.W. 2d 657 (1973). It does not serve as a rehearing on issues that were decided on direct appeal. Neal v. State, supra; Hulsey v. State, supra. It also does not permit matters which might have been raised at trial or on appeal to be the basis for a post-conviction petition unless issues so fundamental as to render the judgment void and open to collateral attack are raised. Neal v. State, supra; Hulsey v. State, supra.

Petitioner was charged with the capital felony murder of Wes Noble during the perpetration of a robbery. Petitioner alleges that although he was found guilty as charged, the jury during sentencing did not find that the murder had been committed for pecuniary gain. He contends that without the element of pecuniary gain there was no robbery and, thus, no capital felony murder under Bly v. State, 263 Ark. 138, 562 S.W. 2d 605 (1978). He asks for a new trial or a reduction in sentence to the minimum punishmen for first degree murder.

No objection was made at trial when the allegedly inconsistent and ambiguous verdicts were returned, nor was this issue raised in petitioner's motion for a new trial. Moreover, this allegation could have been raised on direct appeal, but was not. Thus, this petition for postconvictfon relief is not the proper place to raise this matter for the first time. Neal v. State, supra; Hulsey v. State, supra.

Petitioner also alleges ineffective assistance of counsel at both the trial and appellate levels. Counsel is presumed to be competent until a petitioner demonstrates facts to undermine that assumption and shows that he was prejudiced by that ineffectiveness. Clark v. State, supra. Counsel is ineffective when the "acts or omissions of counsel result in making the proceedings a farce and a mockery of justice, shocking the conscience of the Court, or the representation is so patently lacking in competence or adequacy that is becomes the duty of the Court to be aware of and correct it." Leasure v. State, 254 Ark 961. 964, 497 S.W. 2d 1 (1973). However, mere errors, omissions or mistakes, improvident strategy or bad tactics will not justify postconviction relief. Leasure v. State, supra. Petitioner lists nine numbered allegations to demonstrate counsel's ineffectiveness.

First, he alleges trial counsel failed to request individual voir dire of veniremen and sequestration of veniremen during voir dire.

It is alleged that these failures led to a "superficial jury selection process." Petitioner has not supported this conclusory allegation with specific facts nor has he cited any authority to show that these alleged failures were error. We cannot find any prejudice to petitioner.

Petitioner also alleges that counsel failed to make proper inquiry during voir dire on the veniremen's possible bias due to pretrial publicity and on their views on capital punishment. This failure allegedly led to exclusion of jurors in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). This allegation suffers the same defect as the previous one. Petitioner has not presented any facts to demonstrate prejudicial pretrial publicity or improper exclusion of veniremen. He has not shown how the veniremen were improperly excluded or even which ones were improperly excluded. He has made no showing that prejudicial pretrial publicity was present in Prairie County or that any of the veniremen were aware of it.

Petitioner's third allegation attacks counsel's adoption of a co-defendant's pleadings instead of filing motions for individual and sequestered voir dire; to suppress evidence seized from the vehicle in which petitioner was an occupant; to suppress petitioner's confession; for expert witnesses at the penalty phase; to suppressthe line-up identification and for appointment of co-counsel to assist in the trial. The adopted pleadings were motions for a bill of particulars and for a change of venue. The State furnished a 9 page response on the bill of particulars. The trial court granted both petitioner and that co-defendant a change of venue, but to different places. Neither change was to the place requested in the co-defendant's motion. Petitioner has failed to show prejudice in the adoption of the co-defendant's motions.

Regarding the other alleged failures listed above, the failure to file a motion for individual and sequestered voir dire has already been discussed. An in-depth hearing was held before trial at the request of the State on the confession, line-up and seizure of evidence from the car. Since these matters were raised, petitioner was not

prejudiced. Furthermore, on appeal, we found no error in the trial court's ruling on the confession, lineup and seizure. Pickens v. State, supra. Nor did we find error in the admission into evidence of one of the victim's rings and the gun found the next day near where the car had been abandoned. Petitioner has failed to demonstrate why expert witnesses were needed at the penalty phase or even specify in what fields the witnesses should have been experts. We also find the alleged failure to move for appointment of co-counsel to be conclus Petitioner has completely failed to present any facts to support these allegations and we cannot speculate on any prejudice.

The fourth allegation of ineffectiveness argues that counsel failed to request a hearing on the motion for change of venue and so denied petitioner the opportunity to demonstrate his inability to receive a fair trial in the Southern District of Prairie County. It is also argued that counsel failed to object to venue being changed to that district. Petitioner has not shown that the people of the Southern District were hostile or biased or that petitioner did not receive a fair trial. Since petitioner has failed to show that he was prejudiced by trial in the Southern District, the failure to request a hearing on change of venue would not rise to the level of demonstrating ineffectiveness.

Fifth, petitioner contends that counsel failed to sufficiently cross-examine the state's witnesses at the pretrial hearing on petition confession. This allegation is without merit. Ineffectiveness is not measured by counsel's success in obtaining a desired ruling. On appeal we found the confession to have been voluntarily given. Pickens v. State, supra. Petitioner has failed to show how he was prejudiced and has even failed to present any facts that allegedly would have been presented by a more vigorous cross-examination.

We also find no merit to petitioner's sixth allegation that counsel failed to cross-examine witnesses, to object to the introductio of photographs and to object to "the introduction of tangible evidence which was not specifically connected to petitioner."

Petitioner has failed to specify which witnesses or what beneficial facts would have been elicited by their cross-examination. He has failed to demonstrate why the photographs were objectionable. We will not speculate on the "tangible evidence." However, we do note that the pretrial hearing involved the bank bags, stereo and the money recovered from the car abandoned in Memphis, one of the victim's rings removed from petitioner's hand as he was being processed after the arrest and the .22 pistol recovered near the scene of the abandoned car. We found no error in their admission into evidence. Pickens v. State, supra.

It is argued in the seventh point that counsel failed to properly argue to the jury at the guilt phase that the evidence did not clearly establish which of the three assailants did the actual shooting. Since the arguments were not included in the record before us, we cannot determine whether counsel did or did not argue that matter. Petitioner points out the jury was properly instructed that he was not the only participant in the crime and it would be an affirmative defense if he did not aid or participate in the homicide. The record shows counsel cross-examined all the relevant witnesses on the identity of the person who had actually fired the shots. Prejudice is not shown by an unfavorable verdict. Neal v. State, supra.

The eighth point contends counsel failed to argue at the sentencing stage of the trial that petitioner had not actually committed the homicide and instead presented absolutely nothing in mitigation. It is alleged that there was available "a plethora of relevant information regarding petitioner's background" which should have been offered as mitigation. Leasure v. State, supra. Moreover, we can readily see why such an omission would have been a deliberate tactic since the information is not favorable.

Petitioner's final allegation of ineffectiveness involves the appeal. The tape recordings of the trial were destroyed by fire and the record had to be reconstructed from the reporter's shorthand notes. Counsel's failure to object to the reconstructed record and

its omission of voir dire when given an opportunity allegedly deprived petitioner of a meaningful appellate review. The burden is on petitioner to show error in the reconstructed record and this burden is not met by showing the possibility of error. Butler v. State, 264 Ark. 242, 520 S.W. 2d 272 (1978). Petitioner has not demonstrated prejudice. Since we have previously found there to be no violation of any fundamental constitutional right, we also find that counsel was not ineffective in failing to raise the allegedly inconsistent findings of the jury on appeal.

We do not find that any of the allegations of ineffective assistance of counsel, considered together or separately, justify vacation of the sentence. Petitioner appears to have been competently represented by counsel and to have received a fair trial. Counsel was not incompetent in failing to achieve success by his strategy and tactics.

Finally, on June 23, 1980, we denied petitioner's petition for writ of certiorari without prejudice to his right to apply to the trial court for a supplemental transcript. He now asks us to clearly specify that the trial court has jurisdiction to entertain a motion for supplementation of the record. By our June 23rd order, we vested the trial court with the jurisdiction to entertain such a motion. Petitioner apparently chose to proceed with this petition without applying to the trial court or even to us for clarification. Under Rule 37.2(b), all grounds for relief under this Rule must be raised in the original or amended petition and any grounds not so raised may not be the basis for a subsequent petition.

Petition denied.